INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	2
Reasons for granting the writ	5
Conclusion	17
Appendix	18

CITATIONS

CASES:

American Rolling Mill Co. v. *Stevens*, 290 Ky. 16	10
Aylor v. *United States*, 194 F. 2d 863	9, 10
Barco v. *Penn Mutual Life Ins. Co.*, 126 F. 2d 56, certiorari denied, 317 U.S. 637	10
Bennett v. *Great American Indemnity Co.*, 164 F. 2d 386	11
Carter v. *United States*, 49 F. 2d 221	14
Hoage v. *Employers' Liability Assur. Corp.*, 64 F. 2d 715	10
Lumbra v. *United States*, 290 U.S. 551	12, 13
Norwegian Nitrogen Products Co. v. *United States*, 288 U.S. 294	7
Scott v. *United States*, 189 F. 2d 863, certiorari denied, 342 U.S. 878	5, 10, 12
Texas Employers' Ins. Ass'n. v. *Clark*, 23 S.W. 2d 405	10
United States v. *American Trucking Assns., Inc.*, 310 U.S. 534	7
United States v. *Baker*, 191 F. 2d 1004	5
United States v. *Citizens Loan & Trust Co.*, 316 U.S. 209	7
United States v. *Cooper*, 200 F. 2d 954	10
United States v. *Jackson*, 280 U.S. 183	7
United States v. *Madigan*, 300 U.S. 500	7
Vandalia Coal Co. v. *Holtz*, 68 Ind. App. 670	10, 11

Page

STATUTES:

Act of December 20, 1941, 55 Stat. 844, 846 9
National Service Life Insurance Act of 1940, 54 Stat. 1008, as amended, 38 U.S.C. 801, *et seq.*:
Section 602(d) 9
Section 602(n) 2, 3, 4, 5, 6, 8, 16, 18
38 U.S.C. 445, 817 17
War Risk-Insurance Act, 40 Stat. 398, as amended 11
World War Veterans' Act of 1924, 43 Stat. 607, as amended 11

MISCELLANEOUS:

38 C.F.R. 8.43 14
H. Rep. No. 2312, 77th Cong., 2d Sess., p. 1 ..... 7, 8
S. Rep. No. 1430, 77th Cong., 2d Sess. 7
p. 1 7
p. 3 9
p. 4 9
S. Rep. No. 1105, 78th Cong., 2d Sess., p. 3 9

In the Supreme Court of the United States

October Term 1953

No. 336

UNITED STATES OF AMERICA, *Petitioner*

v.

MRS. MILLIE LANDSMAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Acting Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on May 21, 1953.

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia (R. 29-32) is reported

at 105 F. Supp. 376. The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 36-42) is reported at 205 F. 2d 18.

JURISDICTION

The judgment of the Court of Appeals was entered on May 21, 1953 (R. 43). By order of the Chief Justice, the time for filing a petition for a writ of certiorari was extended to and including September 18, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether ignorance on the part of an insured that he is afflicted with an incurable disease or that he is totally disabled may constitute "circumstances beyond his control" sufficient to excuse failure to file a timely application for waiver of premiums because of continuous total disability under the terms of Section 602(n) of the National Service Life Insurance Act.

STATUTE INVOLVED

The pertinent provisions of Section 602(n) of the National Service Life Insurance Act of 1940, as amended (38 U.S.C. 802(n)), are set forth in the Appendix, *infra,* pp. 18-20.

STATEMENT

Frank I. Landsman was issued two $5,000 policies of National Service Life Insurance prior to his discharge from military service of the United

States on October 26, 1945 (R. 1, 3, 26, 29). Pursuant to his application, $2,000 of this insurance was converted to a twenty-payment life plan effective January 1, 1946 (R. 1, 3, 26, 29-30).[1] Landsman never paid the premiums due on January 1, 1946, and thereafter on the remaining $8,000 of his insurance and did not file by August 1, 1947, or at any time thereafter, an application for waiver of premium, as provided in Section 602(n) of the National Service Life Insurance Act (*infra*, p. 18). (R. 3, 30).

Subsequent to Landsman's death on July 20, 1948 (R. 4, 30), his widow, the respondent herein, filed with the Veterans Administration an application for waiver of premiums and a claim for the death benefits on the $8,000 of NSLI insurance (R. 2, 4, 27, 30). That agency rejected the claim on the ground that Landsman was continuously totally disabled only from and after June 7, 1948 (R. 4, 27, 30).

Respondent, thereafter, on September 25, 1951, filed this action in the United States District Court for the District of Columbia for the recovery of the death benefits of the $8,000 of term insurance (R. 1-2). The United States moved to dismiss the complaint or in the alternative for summary judgment (R. 2-4). The supporting affidavit pointed out, among other things, that the insured had not filed an application for waiver of premiums during

---

[1] The death benefits of this $2,000 policy have been paid and are not here involved.

his lifetime and that the Veterans Administration, by a supplemental decision of October 29, 1951, had determined that the insured's failure to file a timely application for waiver of premiums was not "due to circumstances beyond his control" within the meaning of the third proviso of Section 602(n) *infra*, p. 19 (R. 4). Respondent then filed an opposing affidavit incorporating certain sworn and unsworn statements of other individuals recounting the insured's medical history (R. 5-16).

After the Commissioner of Veterans' Cases in the District Court for the District of Columbia filed an advisory opinion recommending the denial of the Government's motion (R. 17-26), the respondent filed an amended complaint alleging that the insured had been continuously totally disabled with Hodgkins disease from on or before October 1, 1945, and that he remained so disabled until his death on July 20, 1948 (R. 26). The amended complaint further alleged that the insured's failure to file an application for waiver of premiums was due to circumstances beyond his control, since, according to the complaint, he did not know that he was totally disabled and afflicted with an incurable disease and that he was not in full possession of his mental faculties and was frequently found in a stuporous state out of which it was necessary to arouse him (R. 27-28). The United States renewed its motion for summary judgment on the ground, among others, that the amended complaint was insufficient

to bring the case within the purview of the third proviso of Section 602(n) (R. 28-29).

The District Court granted the Government's motion for summary judgment (R. 29-33). The court below, however, reversed, ruling that ignorance of the existence, or the seriousness, of an injury or disease may constitute circumstances beyond the control of an insured sufficient to excuse his failure to file an application for waiver of premiums, if the ignorance is in fact beyond his control (R. 36-42).[2] Judge Proctor dissented (R. 42).

REASONS FOR GRANTING THE WRIT

1. Section 602(n) of the National Service Life Insurance Act authorizes the waiver of premiums on account of an insured's total disability which has continued for six or more consecutive months, on condition, among other things, (1) that the insured file an application for waiver, [3] and (2) that

---

[2] The court below in effect agreed with the District Court that there was no genuine issue as to any material fact and that the United States would have been entitled to summary judgment if the mental competency of the insured were the sole issue (R. 39).

[3] The beneficiary may file an application for waiver of premiums within one year of the insured's death, as was done in the instant case, but, if the insured has lost his right to waiver by his own inaction, the beneficiary cannot posthumously revive and exercise the right. It is established that the beneficiary has no greater right to waiver than the insured had at the time of his death. *Scott* v. *United States*, 189 F. 2d 863, 864 (C.A. 5), certiorari denied, 342 U.S. 878; *United States* v. *Baker*, 191 F. 2d 1004, 1006 (C.A. 10).

the application, with one limited exception, [4] be filed within one year of the date from which the waiver of premiums is sought. [5] The third proviso of Section 602(n), *infra*, p. 19, goes on to provide that the insured's failure to file an application for waiver within one year may be excused if the failure is "due to circumstances beyond his control."

In the instant case, it is conceded that the insured did not pay any premiums on the insurance from January 1946, until his death in July 1948, and further that he did not file any application for waiver of premiums at any time during this period. The complaint, however, alleged that the insured was continuously totally disabled from October 1945 to his death and that his failure to file a timely application for waiver was "due to circumstances beyond his control", because he allegedly was ignorant of the nature of his affliction and therefore of the totality of his disability. By agreeing with this contention and holding that an insured's ignorance of his total disability comes within the third proviso of Section 602(n), the court below, we believe, has committed plain error in a matter

---

[4] Where an application is filed within one year after August 1, 1946, there may be waiver of premiums for not more than 5 years prior to that date. See first proviso of Section 602(n), *infra*, p. 18.

[5] Section 602(n) also requires that the disability must commence while the insurance is in force under premium paying conditions and before the insured reaches the age of 60. Neither of these additional conditions are involved in the present case.

of considerable importance in the administration of veterans' insurance.

The court's ruling is directly contrary to the construction consistently accorded the phrase by the Veterans Administration since its enactment in 1942.[6] This construction is entitled to more than the usual great weight,[7] for the Veterans Administration not only is the agency charged with the administration of the National Service Life Insurance Act, but it also drafted the proviso and submitted it to Congress. See S. Rep. No. 1430, 77th Cong., 2d Sess., p. 1; H. Rep. No. 2312, 77th Cong., 2d Sess., p. 1. Congress acted upon the Administration's recommendation without modifying or in any way amending the proviso and, indeed, the responsible committees adopted the Veterans Administration letter as their report. S. Rep. No.

---

[6] We are advised that at no time since the proviso's enactment in 1942 has the Veterans Administration ever "assumed that mere ignorance of the existence, nature or seriousness of a malady constituted a circumstance beyond an insured's control which precluded the filing of a timely application for waiver or excused his failure to make application timely. In the course of this period many thousands of cases have been adjudicated administratively pursuant to an assumption contrary to the view expressed by the Court of Appeals in the instant case."

[7] See, *e.g.*, *United States* v. *Jackson*, 280 U.S. 183, 193; *United States* v. *Madigan*, 300 U.S. 500, 505; *United States* v. *Citizens Loan & Trust Co.*, 316 U.S. 209, 214; *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315; *United States* v. *American Trucking Assns. Inc.*, 310 U.S. 534, 549.

1430, 77th Cong., 2d Sess.; H. Rep. No. 2312, 77th Cong., 2d Sess. Since Congress accepted the Administrator's judgment in this matter of technical insurance practice, the Administrator's understanding of the provision, as repeatedly manifested by his consistent interpretation since its enactment in 1942, should, we submit, be accorded virtually conclusive weight.

Moreover, the court's reasoning—that had the insured known of his disability and the consequent curtailment of his life expectancy, he would have desired insurance protection and hence would have submitted the requisite waiver application—fails to recognize the thrust of the third proviso. The face of the statute leaves no doubt that the phrase "due to circumstances beyond his control" has no bearing on the insured's attitude toward the insurance. As there set out, the phrase modifies "the insured's failure to make timely application for waiver of premiums" and when read in context plainly was directed to the situation where the insured affirmatively desires to keep the insurance in effect but, because of circumstances beyond his control, it is impossible for him to file an application for waiver within the time allowed.

The Administrator's letter, adopted by the responsible committees as their report, (see *supra*, pp. 7-8), also makes this clear. Although, as the court below points out (R. 39-40), the Administrator did not explain the phrase in discussing the

third proviso (see S. Rep. No. 1430, 77th Cong., 2d Sess., p. 4), he used virtually identical language, *viz,* "by reason of circumstances of which they have no control", in connection with another proposal,[8] and he there used the phrase as referring to the situation of servicemen who are "captured, beseiged, or otherwise isolated by the forces of the enemy" (S. Rep. No. 1430, 77th Cong., 2d Sess., p. 3). Similarly, in recommending the enactment of the fourth proviso of Section 602(n) in 1944 the Administrator referred to mental incompetence on the part of the insured as constituting "circumstances beyond his control." S. Rep. No. 1105, 78th Cong., 2d Sess., p. 3. Contrary to the statements of the court below (R. 39-40), these references made it clear that the Administrator read the third proviso—and Congress accepted the construction—as directed to the insured's ability to make timely application once he has decided he wanted the insurance, rather than to the preliminary question of whether he wanted the insurance at all.[9] *Aylor* v. *United*

---

[8] This language was used with reference to the recommendation for amending Section 602(d) of the Act, which, as added by the Act of December 20, 1941 (55 Stat. 844, 846), (1) established insurance for those servicemen, who became totally disabled in line of duty and remained so for six or more months without insurance protection and (2) provided for waiver of premiums during their disability.

[9] The court below appeared to interpret the Government's position as seeking to limit "circumstances beyond his control" to mental incompetence of the insured (R. 39). The

States, 194 F. 2d 968 (C.A. 5);[10] *Scott* v. *United States,* 189 F. 2d 863 (C.A. 5), certiorari denied, 342 U.S. 878; *United States* v. *Cooper,* 200 F. 2d 954 (C.A. 6); cf. *Barco* v. *Penn Mutual Life Ins. Co.,* 126 F. 2d 56 (C.A. 5), certiorari denied, 317 U.S. 637.[11]

Government does not believe that the language is so restricted, and the Veterans Administration advises that it has always accorded the proviso broader scope.

[10] In the *Aylor* case, the Court of Appeals for the Fifth Circuit commented (194 F. 2d at 970):

> We think that, in order for an insured person to claim a condition of health as "circumstances beyond his control," it must be shown that he was mentally incapable of making an application for waiver.

[11] The analogy to workmen's compensation statutes, adopted by the court below (R. 41-42, fn. 15), is inapposite. Unlike the workmen's compensation laws, which are social legislation based on master-servant relationship and designed to make employers bear the cost of industrial accidents, the benefits provided by the National Service Life Insurance Act are contractual in nature and, since the Act is administered as a legal reserve, mutual life insurance program, the burden of these benefits are in effect borne by the other participating insureds. So far as now pertinent, these statutes further differ in that (1) the time for making claims in workmen's compensation cases is far shorter (thirty days in *Hoage* v. *Employers' Liability Assur. Corp.,* 64 F. 2d 715, 718 (C.A. D.C.) and *Vandalia Coal Co.* v. *Holtz,* 68 Ind. App. 670, 675, cited below (R. 41, 42)) than the one year allowed under the National Service Life Insurance Act, and (2) the language of the workmen's compensation statutes excusing failure to give timely notice is far broader in scope than "circumstances beyond his control." *Hoage* v. *Employers' Liability Assur. Corp., supra,* at 718 ("some satisfactory reason"); *American Rolling Mill Co.* v. *Stevens,* 290 Ky. 16, 24 ("mistake or other reasonable cause"); *Texas Employers' Ins.*

2. The extension by the court below of Section 602(n)'s third proviso to include the insured's ignorance of his total disability reactivates without warrant the administrative problems which the requirement of timely application was designed to put at rest. Experience in the administration of the War Risk Insurance Act, 40 Stat. 398, as amended, and the World War Veterans' Act of 1924, 43 Stat. 607, as amended, and in investigating thousands of claims thereunder, has demonstrated that the difficulty of ascertaining the true facts relating to an alleged condition of total disability increases geometrically with the passage of time. The one year limit on the time for filing applications for waiver of premiums was the result of this experience and, like the statutes of limitation com-

---

Ass'n. v. *Clark*, 23 S.W. 2d 405, 407, 408 (Tex. Civ. App.) ("good cause shown"); *Vandalia Coal Co.* v. *Holtz, supra*, at 675 ("reasonable excuse"). Many of the workmen's compensation statutes also excuse delay in giving notice of injury or in filing claim for benefits if the employer has provided medical treatment for the injured worker, has knowledge of the injury, or is not prejudiced by delay in giving notice or in filing claim. One or more of these excuses was a factor in the determination of each of the compensation cases cited by the court below. In any case, should the analogy be deemed material, it is significant that there are holdings, under workmen's compensation statutes, that an employee's ignorance of his condition, even though it stems from misinformation furnished by his physician, does not excuse his failure to comply with notice requirements. See, *e.g.*, *Bennett* v. *Great American Indemnity Co.*, 164 F. 2d 386 (C.A. 5).

monly applicable to the institution of court proceedings, this limitation was intended, on the one hand, to allow a reasonable time for the filing of meritorious claims and, on the other hand, to outlaw applications which acquired their appearance of merit solely because of the passage of time and the consequent loss of pertinent evidence with which objectively to evaluate them.

The very evils of stale claims, and the lack of an objective basis for evaluation which the requirement of a timely application was designed to obviate, will be perpetuated and accented by the ruling of the court below. The ultimate fact to be determined, under the Court of Appeals' ruling, is the insured's state of mind, a determination which involves not merely what the doctor told him as to his condition, but what he understood and how he evaluated it with reference to the concept of total disability. The patent difficulties inherent in determining such a fact are compounded by the further circumstance that total disability as used in the statute is a technical legal concept which even the courts have found it impossible to define with any degree of precision.[12] See *Lumbra* v.

---

[12] For this reason, the court's attempt to distinguish *Scott* v. *United States*, 189 F. 2d 863 (C.A. 5), certiorari denied, 342 U.S. 878, on the ground that it involved ignorance on the part of the insured of the law, *i.e.*, the provisions of the statute and his rights thereunder, is without substance.

United States, 290 U.S. 551, 559.[13] And when it is recognized that in most instances the determination will probably have to be made after the insured's death, at a time when the principal relevant evidence would be the testimony of persons desirous of supporting the claim for insurance benefits, it becomes clear that the ruling below encourages the submission of unmeritorious claims by making it virtually impossible to screen them.

In addition to substantially increasing the difficulties in administering the waiver provisions, the holding below completely nullifies that requirement in several situations. Under the court's ruling an insured must know more than that he is sick before a timely application for waiver is re-

---

[13] In dealing with the concept of total permanent disability in *Lumbra* v. *United States, supra,* this Court commented (290 U.S. at 559):

> The various meanings inhering in the phrase make impossible the ascertainment of any fixed rules or formulae uniformly to govern its construction: That which sometimes results in total disability may cause slight inconvenience under other conditions. Some are able to sustain themselves, without serious loss of productive power, against injury or disease sufficient totally to disable others. It cannot be said that injury or disease sufficient merely to prevent one from again doing some work of the kind he had been accustomed to perform constitutes the disability meant by the Act, for such impairment may not lessen or affect his ability to follow other useful, and perchance more lucrative, occupations. Frequently, serious physical impairment stimulates to successful effort for the acquisition of productive ability that theretofore remained undeveloped.

quired; he must know, in addition, either his specific malady or that his illness is sufficiently serious to render him totally disabled. There are innumerable maladies such as cancer, arteriosclerosis, and heart disease, to mention only a few, where the debilitation sets in very gradually. As a result, insureds afflicted with these sicknesses are frequently able to carry on normal activities for years before complete incapacity, in the laymen's sense of the term, begins. But, as already indicated *supra,* pp. 12-13, continuous total disability is a technical legal concept, and while the Veterans Administration regulation defines total disability as "any impairment of mind or body which continuously renders it impossible for the insured to follow any substantially gainful occupation" (38 C.F.R. 8.-43), this definition has been judicially enlarged to include situations where the insured is not able to engage in a gainful occupation "without material injury to his health." See *Carter* v. *United States,* 49 F. 2d 221 (C.A. 4).

In these circumstances, it will be easy for his beneficiaries to claim after his death—and difficult for the Veterans' Administration to disprove—that the insured did not know he was totally disabled in the statutory sense, and therefore excused, under the ruling below, from filing a timely application for waiver, despite the fact that, having been financially able to pay the premiums by virtue of his gainful employment, he

had during his lifetime permitted the policy to lapse because he did not want insurance.[14] Such a result circumvents not only the requirement of timely application but the purpose of the waiver provision itself, *i. e.*, to save the insurance of those veterans, who, because of total disability, were financially unable to pay the premiums.

3. The ruling of the court below, if not reversed, will plainly have an important impact on the administration of the National Service Life Insurance Act. The Veterans Administration advises that while precise figures are not available or obtainable, "it is safe to estimate that the total number which may directly involve the question presented in the *Landsman* decision will be several thousand per year." This advice is based on a survey by that agency of 500 decisions, selected at random, in which it found that about one out of every five claims for waiver of premiums involved an application which was not filed in time. Projecting these figures to the 22,000 waiver applications filed in the fiscal year ending June 30, 1952, and the 17,000 applications filed in the fiscal year ending June 30, 1953, the Veterans Administration estimates that there were about 4,700 late filings in 1952 and about 3,600 late filings in 1953. It may be expected that it will now be claimed in a sub-

[14] The insured in this case deliberately converted only $2,000 of his wartime policy to a permanent plan after his release from service, and then stopped paying premiums on the other $8,000. *Supra*, pp. 2-3.

stantial number of these cases that the late filing was excused because of the insured's ignorance of his total disability. Up to this time, the limited scope of the "circumstances beyond his control" provision, as it has been generally understood, has prevented the filing of all but a few suits where waiver was rejected as untimely filed.

In addition, approximately three million policies totalling about twenty billion dollars in face amount have lapsed in the last six years without any application for waiver. Until now, it has been assumed that the insurance protection under these policies had finally terminated and the administration of the National Service Life Insurance Fund has been adjusted accordingly. Should the decision below be permitted to stand, it may be anticipated that claims of "circumstances beyond control", similar to that here involved, will be pressed in an effort to obtain benefits under a substantial number of these lapsed policies. The administrative burden of investigating and adjudicating such claims is potentially very great. Moreover, the payment of benefits thereon may have a serious impact upon the National Service Life Insurance Trust Fund, to the detriment of premium-paying policyholders whose dividends, at the least, will be accordingly reduced.[15]

---

[15] Section 602(n) provides that "Premium rates shall be calculated without charge for the cost of the waiver of premiums herein provided and no deduction from benefits otherwise payable shall be made on account thereof."

These results, we submit, should not be sanctioned without review by this Court, particularly since the decision is by the Court of Appeals for the District of Columbia Circuit, the only circuit in which all suits involving disagreements under the National Service Life Insurance Act may be brought. 38 U.S.C. 445, 817.[16]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

ROBERT L. STERN,
Acting Solicitor General

SEPTEMBER 1953

---

[16] 38 U.S.C. 445 provides in pertinent part:

> In the event of disagreement as to claim, including claim for refund of premiums, under a contract of insurance between the Veterans' Administration and any person or persons claiming thereunder an action on the claim may be brought against the United States either in the district court of the United States for the District of Columbia or in the district court of the United States in and for the district in which such persons or any one of them resides, and jurisdiction is conferred upon such courts to hear and determine all such controversies. * * *

APPENDIX

Section 602(n) of the National Service Life Insurance Act of 1940, c. 757, 54 Stat. 1008, 1011, as amended by the Act of July 11, 1942, Sec. 5, 56 Stat. 658, by the Act of September 30, 1944, Sec. 7, 58 Stat. 764, and by the Act of August 1, 1946, Sec. 7, 60 Stat. 784, (38 U.S.C. 802(n)) provides:

> Upon application by the insured and under such regulations as the Administrator may promulgate, payment of premiums on such insurance may be waived during the continuous total disability of the insured, which continues or has continued for six or more consecutive months, if such disability commenced (1) subsequent to the date of his application for insurance, (2) while the insurance was in force under premium-paying conditions, and (3) prior to the insured's sixtieth birthday: *Provided,* That upon application made within one year after the date of enactment of the Insurance Act of 1946 [August 1, 1946] the Administrator shall grant waiver of any premium becoming due not more than five years prior to the date of enactment of such Act which may be waived under the foregoing provisions of this subsection: *Provided further,* That the Administrator, upon any application made subsequent to one year after the date of enactment of the Insurance Act of 1946, shall not grant waiver of any pre-

mium becoming due more than one year prior to the receipt in the Veterans' Administration of application for the same, except as hereinafter provided. Any premiums paid for months during which waiver is effective shall be refunded. The Administrator shall provide by regulations for examination or reexamination of an insured claiming benefits under this subsection, and may deny benefits for failure to cooperate. In the event that it is found that an insured is no longer totally disabled, the waiver of premiums shall cease as of the date of such finding and the policy of insurance may be continued by payment of premiums as provided in said policy: *Provided further,* That in any case in which the Administrator finds that the insured's failure to make timely application for waiver of premiums or his failure to submit satisfactory evidence of the existence or continuance of total disability was due to circumstances beyond his control, the Administrator may grant waiver or continuance of waiver of premiums: *And provided further,* That in the event of death of the insured without filing application for waiver, the beneficiary, within one year after the death of the insured or the enactment of this amendment, whichever be the later, or, if the beneficiary be insane or a minor, within one year after removal of such legal disability, may file application for waiver with

evidence of the insured's right to waiver under this section. Premium rates shall be calculated without charge for the cost of the waiver of premiums herein provided and no deduction from benefits otherwise payable shall be made on account thereof.

☆U. S. GOVERNMENT PRINTING OFFICE 1953—269912/P.O.296

Office - Supreme Court, U.S.
FILED
OCT 15 1953
HAROLD B. WILLEY, Clerk

No. 336

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1953

UNITED STATES OF AMERICA,

Petitioner,

v.

MRS. MILLIE LANDSMAN,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GEIGER & HARMEL

By: Paul R. Harmel

Attorneys for Respondent

PAGE BOUND VERTICAL IN BOOK

INDEX

	Page
QUESTION PRESENTED	1
REASONS WHY WRIT SHOULD BE DENIED	3
THE MORRELL CASE	9

CITATIONS

	Page
VETERANS ADMINISTRATION INSURANCE MANUAL	5
HEARINGS BEFORE SUBCOMMITTEE OF INSURANCE OF COMMITTEE OF VETERANS AFFAIRS, 1953	5

PAGE BOUND VERTICAL IN BOOK

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1953

No. 336

UNITED STATES OF AMERICA,

Petitioner,

v.

MRS. MILLIE LANDSMAN,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PAGE BOUND VERTICAL IN BOOK

QUESTION PRESENTED

The question in this case is accurately expressed in the following statement of the Court of Appeals (Opinion, R. 42):

> "Giving the phrase 'circumstances beyond control' its fair meaning, free of artificial restriction, we think that ignorance of the existence or seriousness of an injury or disease may in a proper case constitute such a circumstance — if the ignorance is in fact beyond control. Here, the plaintiff in substance alleges that the insured consulted physicians, freely revealed his symptoms, and was guided by the advice received; but that his true condition was not diagnosed until he was on his deathbed. We think that on these allegations it was error to conclude as a matter of law that the insured's failure to apply for waiver of premiums was unexcused. Defendant's motion for summary judgment should not have been granted.....
>
> If the plaintiff is to prevail ultimately, she must of course establish not only that the insured failed to apply for waiver of premiums due to circumstances beyond his control, but also that he was totally disabled within the meaning of the statute."

The question is, thus, a very limited one arising, as it does, upon a motion for summary judgment and merely involving the determination as to whether the affidavits filed in the case demonstrated the existence of a genuine issue of fact entitling respondent to present all of her evidence at a plenary trial.

The question entails a consideration of the numerous facts alleged in the dozen affidavits and statements of the insured's physicians, employers, relatives and friends (R. 5-17). These facts may be summarized as follows:

1. The insured became afflicted with Hodgkin's disease while in the military service (Affidavits of Drs. Parris, Fink, Inwood and Jackson, R. 13-14, 14, 13, 15).

2. The disease was already well advanced at the time of his discharge from the Army in October, 1945, from which time until his death he was totally disabled. (Affidavits of Dr. Circuard, R. 6, Dr. Terrence, R. 8, Dr. Bellinger, R. 9, Steinschreiber, R. 9, Cohen, R. 11, Rosalyn Landsman, R. 12 and respondent, R. 5-16.)

3. The insured was never aware of his disease or total disability. His own doctors diagnosed his case and treated him only for sinusitis and grippe (Dr. Inwood, R. 13, Dr. Parris, R. 13, Dr. Apfel, R. 15, Respondent, R. 15). His employers, although they knew he could not perform his work, retained him on the payroll because of his excellent prewar record, their sympathy for him and their ignorance of the fact that he had an incurable disease (Circuard, R. 6, Terrence, R. 8, Bellinger, R. 9, Respondent, R. 16).

4. The fact that the doctors diagnosed his case as a relatively minor ailment, the fact that his employers kept him on the payroll and the fact that he was a young man, only 31 when he died, combined to create a delusion that he was not totally disabled and that his disability was only temporary. His ignorance of the true facts is further evidenced by his converting a $10,000 Ordinary Life policy to a $2,000 20 Year Endowment policy which no sane man, who knew he was about to die, would do (R. 16).

It is evident, from the foregoing, that the Government's statement of the question is oversimplified both from a legal and factual standpoint.

PAGE BOUND VERTICAL IN BOOK

PAGE BOUND VERTICAL IN BOOK

REASONS WHY WRIT SHOULD BE DENIED

The Government has, in this Court, radically changed its position from that in the Courts below. In the District Court and Court of Appeals, the Government relied entirely upon the contention that the phrase "circumstances beyond control" must be limited to "mental incapacity".

As the Court of Appeals stated in its opinion (R. 39):

> "The Government urges that 'circumstances' are beyond the insured's control, within the meaning of the statutory language, only when the insured is mentally incompetent."

The argument was reiterated throughout the Government's brief in the Court of Appeals:

> "The appellant attempts to show that Congress intended to give this phrase a broader meaning than mental incompetence." (page 9)
>
> "Thus, it appears from the legislative history that Congress intended that the phrase 'circumstances beyond control' should have no broader meaning than 'mental incapacity'." (page 11)
>
> "But none of the facts relied upon showed that the insured suffered from a mental incapacity." (page 13)
>
> "In considering all of the evidence on the question and taking a most liberal view of it, we fail to see that there was sufficient evidence to take to the jury the question of whether the insured was mentally incapable of making an application for waiver of his insurance premiums." (Quotation from Aylor case, page 15).

In the District Court, taking the same position, the Government managed to persuade the trial judge to limit the meaning of "circumstances beyond control" to "mental incapacity" (R. 29).

The Court of Appeals demonstrated, in its opinion, that this obviously unnatural limitation of the meaning of the phrase could nowhere be found in the legislative history of the statute and that, in fact, the legislative history showed that the broader phrase was intentionally selected (R. 36-42).

The Government has apparently been persuaded by the reasoning of the Court of Appeals because it has completely abandoned this argument. In the petition herein, the Government now says, despite its most vigorous contentions to the contrary below:

> "The Government does not believe that the language is so restricted." (Petition, pages 9-10, footnote 9).

What argument has the Government substituted for the one so strenuously urged and now abandoned? In the Courts below, the Government's interpretation of "circumstances beyond control" was, at least, clear cut and unambiguous, - it meant, said the Government, "mental incompetence". Now, however, it is impossible to find within the Government's petition any definite or clear construction of the phrase. The Government seems to content itself with the purely negative contention that the phrase does not include the circumstances involved in the instant case. Nor can there be found in the petition any discussion as to why these circumstances are not embraced within the ordinary meaning of this common phrase.

There seems to be an implication that the phrase must be limited to cases in which the insured affirmatively desires to file an application, but is prevented from doing so by circumstances beyond control. Even this implied argument collapses, however, when one considers mental incompetence which is admittedly one of the circumstances within the meaning of the phrase. In a case of mental incompetence there could be no affirmative desire to file because the insured is mentally incapable of forming such a desire. It is clear, therefore, that the desire to file is not an indispensable element in the construction of "circumstances beyond control".

Instead of endeavoring to show affirmatively why the circumstances in the instant case are not within the meaning of the phrase "circumstances beyond control", the Government has relied on two arguments:

(1) The construction of the phrase by the Court of Appeals is contrary to that consistently accorded it by the Veterans Administration; and,

(2) The construction of the phrase by the Court of Appeals would impose a great administrative burden on the Veterans Administration.

It is true that the ruling of the Court of Appeals is contrary to the construction theretofore given the phrase by the

PAGE BOUND VERTICAL IN BOOK

Veterans Administration, but the construction of the Veterans Administration was the same as the one urged in the Courts below, limiting the meaning of the words to mental incapacity, a construction which the Government itself admits is erroneous (Petition for writ of certiorari, page 9, footnote 9).

The construction given this phrase by the Veterans Administration was the subject matter of certain Congressional Hearings in May 1953 before the Subcommittee of Insurance of the Committee of Veterans Affairs of the House, on H.R. 50, H.R. 253 and H.R. 1993, bills to amend Section 602(n) of the National Service Life Insurance Act, the identical section involved in the instant case. An insurance expert of the Disabled American Veterans, one of the great veterans' service organizations, constantly handling such insurance claims, stated (page 1169):

> "We do not believe this method will change the minds of the personnel of the Veterans' Administration as to their interpretation of that part of the law, 'due to circumstances beyond his control'. The criticism of the existing legislation is the Veterans' Administration's interpretation of what constitutes circumstances beyond the control of the insured to prevent him from filing a timely claim for waiver of insurance premiums. On cases in which this organization has appeared before the Veterans' Administration, we have found that the only circumstances the Veterans' Administration will recognize and hold as 'beyond his control' is where the insured is or was incompetent."

But, as we have seen, this construction has been abandoned and its abandonment is evidenced not only by the change of the Government's position in the within case, but by a recent official publication of the Veterans Administration itself. On July 15, 1953, the Veterans Administration, for the first time, published a construction of this phrase and it is as follows (Veterans Administration Insurance Manual 9-3, Part VI, Par. 79, quoted in Hearings, supra, page 1202):

> "The question as to whether the insured's failure to make timely application for disability insurance benefits under National Service Life Insurance was due to circumstances beyond his control must be determined on the facts on each individual case. For that reason it is not possible to lay down any hard and fast rules for reaching this determination. Generally, it is the policy to waive the insured's failure to file timely application if he suffers from any mental disability rendering him incapable of looking after

PAGE BOUND VERTICAL IN BOOK

his own affairs, or any physical disability of a nature or a sufficiently severe degree that it renders him incapable of looking after his affairs, or where there are other unusual and extenuating circumstances which are the probable cause of the insured's failure to make timely application."

Thus, although the Court of Appeals ruling was contrary to the Veterans Administration interpretation of the phrase "circumstances beyond control", the Veterans Administration has abandoned this interpretation both in the present suit and in its instruction manual. The present published construction is entirely consistent with the Court of Appeals decision.

Parenthetically, it should be noted that the new Veterans Administration construction includes, as an excuse for late filing, "probable cause", consisting of unusual or extenuating circumstances. Under similar terminology in workmen's compensation law it is held in numerous cases that ignorance of the existence of an injury or disease or of its seriousness constitutes such an excuse (Court of Appeals Opinion, R. 41, footnote 15).

The final contention of the Government is that if the Court of Appeals' construction is followed, the filing of unmeritorious claims, difficult for the Veterans Administration to process, will be encouraged.

For various reasons there would be little likelihood either of the filing or of the successful prosecution of many unmeritorious claims.

In the first place the claimant must establish the fact that the insured was totally disabled. The burden of proving this is his and it would not be an easy task to deceive Veterans Administration on this point not only because of its vast experience but because it would have, in the great majority of cases, a complete medical file on the insured.

After having proved to the satisfaction of the Veterans Administration that the insured was totally disabled, the claimant would then have the burden of proving the insured's ignorance of such disability and the fact that such ignorance

PAGE BOUND VERTICAL IN BOOK

could not have been avoided or was beyond his control. If the claimant, for example, were held to the standard of proof in the instant case, he would have to show the following facts: A rare disease not frequently diagnosed; the failure of many physicians to diagnose it and their informing him that he had a minor ailment; a sympathetic employer keeping him on the payroll although he could not perform his duties, thereby strengthening his delusion that he was not totally disabled. The claimant would also have to show that the insured was a young man of about 30 who, under the aforesaid circumstances, would not be likely to think he was totally disabled and afflicted with an incurable disease; that the insured converted a $10,000 Ordinary Life insurance to a $2,000 20 Year Endowment, which no man knowing that he was totally disabled and afflicted with a rapidly fatal disease, and with a family and newborn baby to protect, would think of doing.

The unique combination of facts in the instant case would be hard to duplicate. Indeed, since 1942, no case involving such a set of facts has been reported and the Government has not brought to the attention of the courts in this litigation any such unreported cases. It is difficult to imagine that there would exist a great many claims based upon a similar combination of facts.

Although the Government dwells upon the disastrous administrative consequence to the Veterans Administration, if it were compelled to consider on their merits claims such as the instant one, this is exactly what the Veterans Administration did with the respondent's claim. One would think that out of self-protection the Veterans Administration would pursue a firm policy of rejecting such claims entirely on the ground of untimeliness. Yet, in the instant case, the Veterans Administration accepted the claim, did not even mention late filing, considered its merits and denied it, not for untimeliness, but on the ground that the insured was not totally disabled!

It was only after the respondent filed her suit in the District Court that the Veterans Administration, perhaps not too

PAGE BOUND VERTICAL IN BOOK

confident in the strength of its finding that the insured was not totally disabled, hurriedly made an ex parte "supplemental" finding that the failure to file the claim on time was not due to circumstances beyond the insured's control.

If such great difficulties are attendant upon filing late claims based on total disability, why has not the Veterans Administration attempted (or if it has attempted, why has it not succeeded) to have Congress amend the War Risk Insurance Act (40 Stat. 398, as amended) and World War Veterans' Act of 1924 (43 Stat. 607, as amended) which permit the filing of total and permanent disability claims without any time limitation whatsoever? Under these statutes the Veterans Administration has recently considered and allowed claims going back to World War I (Hearings, supra, page 1169). Yet despite the long existence of the statutes, they have not been amended at the instance of the Veterans Administration or of anyone else.

If the Veterans Administration has experienced administrative burdens of great magnitude in processing such claims under the War Risk Insurance Act (Petition, page 11), why did the Veterans Administration itself, as the Government assures us it did (Petition, page 7), ask Congress in 1942 to excuse late filings of these claims for "circumstances beyond control"? Instead of asking Congress to use this very language, why did not the Veterans Administration advocate more restrictive language, as it did in connection with another section of the National Service Life Insurance Act (Section 602(d)(5) where the words "mentally or legally incompetent" were recommended by Veterans Administration and adopted by Congress).

Finally, if the words "circumstances beyond control" are, in fact, so broad as to cause administrative difficulties, the remedy is not to have the Courts do violence to the natural meaning of the language, but to have Congress change it. As stated by the Court of Appeals in its opinion (R. 41):

> "If, as the Government argues, difficulties in administration result from adoption of a broader interpretation than the one it contends for, the remedy lies with Congress."

PAGE BOUND VERTICAL IN BOOK

THE MORRELL CASE

The petition for a writ of certiorari in United States of America vs. Morrell, filed at about the same time as the petition herein and which the Government has requested this Court consider along with the instant case, presents an entirely different question. The question in the Morrell case is to what extent premiums which an insured has paid while totally disabled and which therefore are refundable but have not been refunded may be applied to prevent his insurance from lapsing for non-payment of premiums after total disability has ceased. There is not even a remote similarity to the instant case either in fact or in law.

For the foregoing reasons the Government's petition for certiorari should be denied.

Respectfully submitted,

GEIGER and HARMEL

By: Paul R. Harmel
Paul R. Harmel

Attorneys for Respondent,
231 Tower Building
Washington, D.C.

PAGE BOUND VERTICAL IN BOOK

ACKNOWLEDGEMENT OF SERVICE

Service of a copy of the foregoing brief in opposition to petition for writ of certiorari is hereby acknowledged this 15th day of October, 1953.

Acting Solicitor General